



Harvard Law School
**Emmett Environmental
Law & Policy Clinic**

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August 20, 2014

Via FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue (2822T), N.W.
Washington, D.C. 20460

RE: Freedom of Information Act Request for Information Regarding Oil Spill
Dispersants

Dear Madam or Sir:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, and its implementing regulations, I make this request for records on behalf of the Emmett Environmental Law and Policy Clinic at Harvard Law School (the "Emmett Clinic"). This FOIA request sets forth specific records sought by the Emmett Clinic and establishes its entitlement to a waiver of all fees associated with production of these records.

I. THE RECORDS SOUGHT IN THIS REQUEST.

This request is for EPA's records relating to its rulemaking to revise the National Oil and Hazardous Substances Pollution Contingency Plan; Subpart J Product Schedule Listing Requirements for dispersants. Specifically, we seek all EPA records developed, examined, referred to, or relied upon by EPA staff in drafting the Notice of Proposed Rulemaking on this topic that was sent to the White House Office of Management and Budget on July 18, 2014 (Docket Number EPA-HQ-OPA-2006-0090), including but not limited to the following topics:

- The effects of dispersants on humans or on marine mammals, fish, birds, or other wildlife;
- The movement of dispersants in the marine ecosystem;
- The effects of dispersants in cold environments such as the Arctic Ocean;
- The effects of dispersants in freshwater environments;
- Communications between EPA staff and the manufacturers of dispersants.

To the extent EPA believes any of the requested records are exempt from FOIA's disclosure requirements, the Emmett Clinic asks for all reasonably segregable portions of those records that are not themselves exempt. *See* 5 U.S.C. § 552(b). If EPA elects to withhold any requested record or portion thereof, the Emmett Clinic asks that EPA provide an itemized index describing each record or portion withheld and a detailed justification that correlates EPA's

grounds for withholding with one or more enumerated FOIA exemptions. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

II. ENTITLEMENT TO A FEE WAIVER.

EPA should waive all search, review, and copying fees associated with this FOIA request because (1) disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and (2) the request is not primarily in the commercial interest of requesters. *See* 5 U.S.C. § 522(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

A. Disclosure Is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of Government.

EPA considers four factors in determining whether a requested disclosure is likely to contribute significantly to public understanding of the operations and activities of the government. *See* 40 C.F.R. § 2.107(l)(2)(i)-(iv). This FOIA request satisfies all four of these factors.

1. *The subject of the requested records concern EPA's activities.*

First, in determining whether to grant a fee waiver, EPA considers whether the requested records “concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(l)(2)(i). The requested records satisfy this factor because they concern EPA’s ongoing rulemaking to revise the Subpart J Product Schedule listing requirements of the National Oil and Hazardous Substances Pollution Contingency Plan, which is an identifiable operation and activity of EPA for which the agency has expended public funds and resources.

2. *Disclosure is “likely to contribute” to the public’s understanding of EPA’s activities.*

Second, EPA considers whether disclosure is “‘likely to contribute’ to an understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). This factor is satisfied because the regulation of dispersants involves complex policy and scientific issues not easily understood by the general public and the Emmett Clinic will use the requested records to help educate the public on these complex issues and the overall effectiveness of EPA’s regulation of dispersants for oil spill response. The requested records will contribute to the public’s understanding of EPA’s progress towards addressing the risks posed by dispersants and will facilitate participation in the regulatory process for the National Contingency Plan revisions.

3. *Disclosure will contribute to the dissemination of the information to a reasonably broad audience of persons interested in the subject.*

Third, EPA assesses whether the requested documents will contribute to the “public understanding” of government operations by being disseminated to a “reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 2.107(l)(2)(iii). In so doing, EPA considers the requester’s “expertise in the subject matter and ability and intention to convey information to the public.” 40 C.F.R. § 2.107(l)(2)(iii). This factor is satisfied because the Emmett Clinic has considerable experience and expertise in environmental regulation, including the issuance of several white papers

addressing various aspects of the regulation of offshore oil drilling.¹ Furthermore, the Emmett Clinic has demonstrated its ability and intent to disseminate information concerning environmental risks and policy solutions to the general public, as well as interested groups and individuals, through the publication of white papers, presentations at conferences, and meetings with representatives from regulated companies, nonprofit organizations, and government agencies.

4. *Disclosure will contribute “significantly” to the public’s understanding of EPA’s activities.*

Fourth, EPA considers whether the requested documents will “significantly” contribute to the public’s understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). In examining this factor, EPA considers whether “[t]he public’s understanding existing prior to the disclosure, [will] be enhanced by the disclosure to a significant extent.” 40 C.F.R. § 2.107(l)(2)(iv). However, EPA must “not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is ‘important’ enough to be made public.” *Id.* In applying the significance factor, the courts consider whether the request will benefit the public interest, whether there is significant media attention focused on issues related to requested records, and whether the requesters intend to disseminate the information to the public. *See Friends of Coast Fork v. Dep’t of Interior*, 110 F.3d 53, 55 (9th Cir. 1997); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994).

The Emmett Clinic’s request serves the public interest in two significant ways. First, disclosure of the requested records will allow it to educate the public about the risks associated with the use of dispersants. Second, the Emmett Clinic’s request significantly serves the public interest because the requested records will inform the public on the current status of EPA’s rulemaking and EPA’s compliance with the Clean Water Act. *Cf. Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313-14 (D.C. Cir. 2003) (finding a FOIA request aimed at determining government compliance with law entitled to a fee waiver). EPA initiated its rulemaking to revise the Subpart J Product Schedule listing requirements several years ago. However, EPA has yet to issue a Notice of Proposed Rulemaking. The requested records will inform the public on the current status of the rulemaking process and will facilitate public participation in that process.

The significance of the requested records is further demonstrated by the media interest in the regulation of dispersants. For example, there was extensive coverage of the effects of the dispersants used in response to the Deepwater Horizon oil spill in 2010.² There has also been

¹ A selection of the Clinic’s publications is available at <http://blogs.law.harvard.edu/environmentallawprogram/clinic/clinic-publications>.

² *See, e.g.,* Bruce Alpert, *Watchdog Group Reports Health Problems from Dispersant Use During BP Oil Spill*, NEW ORLEANS TIMES-PICAYUNE, Apr. 19, 2013; David A. Fahrenthold & Steven Mufson, *Documents Indicate Heavy Use of Dispersants in Gulf Oil Spill*, WASHINGTON POST, Aug. 1, 2010; Leslie Kaufman & Elisabeth Rosenthal, *Worry About Dispersant Rises as Men in Work Crew Complain of Health Problems*, N.Y. TIMES, May 27, 2010; Campbell Roberston & Elisabeth Rosenthal, *Agency Orders Use of a Less Toxic Chemical in Gulf*, N.Y. TIMES, May 20, 2010.

recent coverage of the fact that dispersants have continued to be found on Gulf beaches as recently as this year.³

B. The Emmett Clinic Does Not Have a Commercial Interest That Would Be Furthered by the Requested Disclosure.

The second criterion for a fee waiver is that the request must not primarily be in the commercial interest of the requesters. 40 C.F.R. § 2.107(l)(3). The Emmett Clinic does not have a commercial interest that will be furthered by the requested disclosure. Rather, it is a law school legal clinic dedicated to public interest environmental advocacy and educating both students at Harvard Law School and the public more generally about environmental problems and policy solutions that address those problems. It will use the requested records to facilitate public discourse and education on the risks of dispersants and ways to mitigate and avoid such risks. The Emmett Clinic will also use the requested records to facilitate public participation in EPA's ongoing rulemaking to revise the Subpart J Product Schedule Listing Requirements of the National Oil and Hazardous Substances Pollution Contingency Plan. Because the Emmett Clinic will not use the requested records to its economic benefit, it is entitled to a fee waiver.

* * *

The records subject to this FOIA request are EPA records that are not readily available to the public, will contribute significantly to public understanding of EPA's regulation of oil spill dispersants, and are not in the commercial interest of the Emmett Clinic. The Emmett Clinic has made the required "minimal showing of their legitimate intention to use the requested information in a way that contributes to the public understanding of the operations of government agencies" and is entitled to a waiver of all search, review, and copying fees associated with this request. *Inst. for Wildlife v. U.S. Fish & Wildlife Service*, 290 F. Supp. 2d 1226, 1232 (D. Or. 2003).

I look forward to your response to this request within twenty (20) business working days of receipt in accordance with 5 U.S.C. § 552(a)(6). Please do not hesitate to call me if you need clarification about whether certain records fit within the parameters of this request.

Sincerely,

Shaun Goho
Senior Clinical Instructor and Staff Attorney

³ See Kimberly Blair, *BP Oil Spill Dispersants Still in Environment*, PENSACOLA NEWS JOURNAL, July 26, 2014.